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BEFORE THE ARIZONA CORPORATION COMMISSION

JEFF HATCH-MILLER
Chairman
MARC SPITZER
Commissioner
WILLIAM MUNDELL
Commissioner
MIKE GLEASON
Commissioner
KRISTIN MAYES
Commissioner

LEVEL 3 COMMUNICATIONS, LLC,
Complainant

vs.

QWEST CORPORATION,
Respondent

DOCKET NOS. T-01051B-05-0415
T-03654A-05-0415

QWEST CORPORATION'S EXCEPTIONS TO RECOMMENDED OPINION AND ORDER

Qwest Corporation ("Qwest") respectfully submits these exceptions and proposed amendments to the Recommended Opinion and Order (the "ROO") issued by the Administrative Law Judge in this proceeding on July 6, 2006.

I. INTRODUCTION

Level 3 Communications, LLC ("Level 3") provides service to Internet Service Providers ("ISPs") using Virtual NXX ("VNXX") routing. The United States Second Circuit Court of Appeals observed just three weeks ago that VNXX "disguises" interexchange traffic to make it appear to be local, and violates the "FCC's longstanding policy of preventing regulatory arbitrage," thus causing the ILEC to subsidize companies

like Level 3 in their provision of service to their ISP customers.[1] Qwest has made that point in this case previously and has argued strenuously that VNXX routing violates Arizona rules. However, the Arizona Corporation Commission (the "Commission") has displayed caution about outright banning VNXX the way some other regulatory agencies have done, and instead has determined to pursue a generic docket regarding VNXX.[2]

At the same time, the Commission has found correctly that VNXX is "a departure from the historic means of routing and rating calls and has broad implications for intercarrier compensation."[3] And, as the ROO correctly finds, under the terms of the Interconnection Agreement ("ICA") between Qwest and Level 3, the exchange of VNXX traffic over LIS trunks is not allowed.[4]

In light of all the circumstances surrounding the VNXX controversy, in the recent Arbitration Order for Level 3 and Qwest, the Commission sought to maintain the "status quo" for now.[5] The Commission recognized that VNXX should be discontinued, but

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[1] *In re Core Communications*, 2006 WL 1789003 at *33 (D. C. Cir. June 30, 2006). *See also id.*, at *8, *21, See more detailed discussion if this case in section , infra.

[2] Pac-West Order (Decision No. 68220) ¶ 29; Level 3/Qwest Arbitration Order (Decision No. 68817), at p. 82, lines 22-24.

[3] Order No. 68820, ¶ 29.

[4] ROO ¶ 61.

[5] Statement of Commission Chairman Hatch-Miller: "I want to be very, very clear about what we're imposing and how we're changing the status quo, because I don't want to change it without a thorough, thorough, thorough analysis." Certified Transcript of Audiotape of Arizona Corporation Commission Open Meeting Agenda Item U-7, Docket No. T-01051B-05-0350, June 27, 2006. TR 11, lines 15-21.

Statement of Commissioner Gleason: "[I]t looks to me like what we should do here is to keep . . . things as stable as we can . . . for a while." *Id.,* TR 62, lines 2-3.

Statement of Commissioner Mayes: "[M]y concern was I didn't want to do anything that was punitive to Qwest under the status, given the status quo, but I also didn't want us to do anything that would impose a cost on Level 3 that then would be passed onto Level 3's customers and that would disrupt the marketplace as it currently stands, until the Commission has a chance to do the generic docket and come to a policy decision on that. *Id.*, p. 10, lines 18-25.

ordered the parties to work out an interim replacement for VNXX. However, under this ROO Qwest will have to pay Level 3 for VNXX traffic for nearly two years' worth of past traffic. That result dramatically changes rather than preserves the status quo. To date, the Commission has maintained the status quo going forward by ordering the parties to effect a replacement for VNXX; the Commission has maintained the status quo by not sanctioning Level 3 for using an unauthorized call routing scheme; and Level 3 has provided its long distance service over the last two years without Qwest billing it for access charges. Inexplicably, the ROO would now have the Commission change the status quo in only one respect—by making Qwest pay retroactively ISP termination charges on VNXX traffic, while leaving everything else alone. That solution does not maintain the status quo.

The Commission Staff characterized Commissioner Mayes' amendment to the Level 3 Arbitration as a "win-win" solution.[6] If Qwest must pay Level 3 for VNXX traffic for the past periods, the "win" for that time goes completely to Level 3; such a result is certainly not a "win" for Qwest. If Qwest is ordered to pay Level 3 for past periods for termination of VNXX traffic, such payment is in reality a "windfall" for Level 3, because it is impossible to conclude that Qwest obligated itself to pay for traffic that is not allowed by the ICA, and that in all likelihood will ultimately be found by the Commission to be in violation of the Commission's rules. Additionally, the ROO's analysis of the "plain language" of the ISP Amendment is clearly wrong, as is the analysis of the scope and meaning of the FCC's *ISP Remand Order*. The Commission should conclude that Qwest is not obligated to pay Level 3 for the termination of VNXX ISP traffic for past periods, for all the reasons stated below. Taking that action is legally sound *and* preserves the status quo.

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[6] *Id.*, TR 64, lines 16-19; TR 66, lines 2-5.

II. DISCUSSION

Qwest takes exception to portions the ROO's conclusions and findings regarding the meaning of the ICA and the FCC's *ISP Remand Order* (¶¶ 54-60; the specific portions that Qwest requests be amended are set forth in Qwest's proposed Amendments, Attachment A). Neither the ICA nor the *ISP Remand Order* requires Qwest to pay terminating compensation to Level for VNXX ISP traffic.

A. The "Plain Language Of the ICA" Does Not Support The ROO's Conclusion (¶ 60) That VNXX Traffic Is Subject To Compensation for ISP Traffic

The ROO notes that the section of the ISP Amendment quoted at paragraph 54 does not carve out, or except, VNXX ISP-bound traffic from the scope of ISP-bound traffic. However, failure to mention VNXX in the Amendment can best be explained by the fact that the parties did not need to carve out that which was never included in the first place. The ROO itself concludes that "under the terms of the ICA, the use of LIS trunks is limited to EAS/local traffic . . . VNXX ISP-bound traffic does not originate and terminate in the same LCA. Thus the terms of the ICA do not allow for the exchange of VNXX traffic over LIS trunks." (ROO ¶ 61, emphasis added). Therefore, the fact that the ISP Amendment does not carve out VNXX ISP traffic provides no basis for finding that Qwest must pay termination for such traffic. Indeed, the absence of any reference to VNXX in the Amendment is strong evidence that the parties did not intend to include it.

The ROO's conclusion that VNXX ISP traffic is subject to the compensation scheme established in the *ISP Remand Order* is not supported by the "plain language of the ICA," because, as the ROO itself establishes, other parts of the ICA plainly contradict this conclusion of the ROO. The ROO concludes correctly that "the terms of the ICA do not allow for the exchange of VNXX traffic over LIS trunks." (¶ 61). Further, the ROO orders Level 3 to discontinue the use of VNXX arrangements. (¶ 64). Therefore, there is no uncontradicted, plain meaning that Qwest is obligated to pay for VNXX traffic, because the ISP Amendment could not

reasonably be interpreted to require payment for traffic delivered by means which are *forbidden by other provisions of the very same agreement.*

The ROO's characterization of ¶ 54 as "plain language" that VNXX ISP traffic is compensable as ISP-bound traffic is demonstrably wrong for additional reasons. First, the Parties intended for the ISP Amendment to apply to the traffic that is subject to the *ISP Remand Order*, nothing more and nothing less.[7] As discussed hereafter, the law is now clear that the term "ISP-bound traffic (as that term is used in the FCC ISP Order)" excludes VNXX ISP traffic and applies only to ISP traffic where the calling party and the ISP are physically located in the same local calling area (*i.e.,* local ISP traffic). Second, there is no basis to conclude that VNXX traffic is EAS/Local traffic, because EAS/Local traffic is defined as traffic originated and terminated in the same Local Calling Area ("LCA."). And third, under the *ISP Remand Order,* which remains fully in effect, ISP traffic is not section 251(b)(5) traffic.

One the errors of the ROO is its complete inconsistency with Decision No. 68817, where, in response to the claim by Level 3 that the *ISP Remand Order* constitutes an endorsement of VNXX, the Commission concluded that '[i]f the FCC had intended the *ISP Remand Order* as an endorsement of the use of VNXX, we believe it would have at least mentioned it."[8] Yet, in the face of that Commission finding, the ROO concludes that "the *ISP Remand Order* applies to all

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[7] That the ISP Amendment means what is meant by the *ISP Remand Order* is established by at least three references to the *ISP Remand Order*: (i) the recital clause of the ISP Amendment that "the Parties wish to amend the [ICA] to *reflect the [ISP Remand Order]*; (ii) Section 3.1 of the ISP Amendment, which states, "The Parties shall exchange ISP-bound traffic *pursuant to the compensation mechanism set forth in the FCC ISP Order*; and (iii) Section 2 of the ISP Amendment, which states, "The Parties agree to exchange all EAS/Local (§251(b)(5)) and ISP-bound traffic (*as that term is used in the FCC ISP Order*) at the FCC ordered rate, *pursuant to the FCC ISP Order*." (Emphasis added). Thus, the proper interpretation of the ISP Amendment is determined by the proper scope and meaning of the *ISP Remand Order.* Arbitrator John Antonuk reached the same rule of interpretation of the ISP Amendment in the Arbitration Ruling between Qwest and Pac-West Telecomm (AAA Case #77181-00385-02, JAG Case No. 221368, 2004). In interpreting the ISP Amendment in that case, the Arbitrator concluded, "The parties' intent was to do no more and no less than what the FCC provided for in the ISP Remand Order . . ."

[8] Decision No. 68817, at 27.

ISP-bound traffic." (¶ 59). Ironically, through its erroneous interpretation of the ISP amendment, the Commission does just what it says the FCC did not do: attempt to validate VNXX traffic and use the *ISP Remand Order* as the reason for doing so.

B. The ROO's Conclusion That the *ISP Remand Order* Applies To All ISP-Bound Traffic (¶ 59) Is Error. The Decisions of Four Different U. S. Courts Of Appeal (Two More Cases Handed Down In The Last Three Weeks) Interpreting the *ISP Remand Order* Preclude a Finding That the *ISP Remand Order* Applies To All Calls To ISPs.

The ROO concludes that neither *WorldCom, Inc. v. FCC*[9] ("*WorldCom*") nor the First Circuit's decision in *Global NAPs v. Verizon New England*[10]("*Global NAPs I*") are determinative of the scope of the *ISP Remand Order* (¶ 57) and that the *ISP Remand Order* applies to all ISP-bound traffic (including VNXX ISP-bound traffic) (¶ 59). These conclusions are demonstrably incorrect. Moreover, those two decisions were reaffirmed by two more federal circuit court decisions (another from the D. C. Circuit and a decision of the Second Circuit) that likewise conclude that the scope of the *ISP Remand Order* is limited to local ISP traffic. Given those clear holdings, there is simply no basis to conclude that the law regarding the scope of the *ISP Remand Order* is unsettled.

Qwest's Opening and Response briefs provided a detailed analysis of the history leading up to the *ISP Remand Order* and an analysis of the order itself, all of which demonstrates conclusively that the *ISP Remand Order* applies only to local ISP traffic. (Qwest Opening Brief at 11-17, Qwest Reply Brief, at 5-8).[11] But other compelling authority leads to the same conclusion. Four federal circuit court decisions have all concluded that the scope of the *ISP Remand Order* is limited to local ISP traffic, and that existing state and federal compensation

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[9] 288 F.3d 429 (D.C. Cir. 2002).

[10] 444 F.3d 59 (1st Cir. 2006).

[11] Among those reasons were the fact that the context and language *ISP Remand Order* is clear that the only issue being considered by the FCC was local ISP traffic (*ISP Remand Order* ¶¶ 10-13), a proposition that is confirmed by FCC's unequivocal statements that it had no intent to interfere with either the interstate or intrastate access charge regime that applies to interexchange calls (*Id.* ¶¶ 34-41). Those reasons alone are more than sufficient to conclude that the *ISP Remand Order* applies only to local ISP traffic.

regimes for interexchange calls remain unaffected by the order.[12]

The first statement on the question of the breadth of the *ISP Remand Order* comes in the D.C. Circuit's review of the *ISP Remand Order* in *WorldCom*, where the D.C. Circuit stated the *holding* of the *ISP Remand Order*: "In the order before us the [FCC] *held* that under § 251(g) of the Act it was authorized to 'carve out' from § 251(b)(5) calls made to internet service providers ("ISPs") *located within the caller's local calling area.*"[13] Thus, the court that was statutorily armed with exclusive jurisdiction to interpret the *ISP Remand Order* states, in plain and unequivocal language, that the *ISP Remand Order* applies *solely* to local ISP traffic. Events since *WorldCom* have demonstrated that the D. C. Circuit's description of the holding of the order is not unsettled.

The most definitive subsequent decision is the *Global NAPs I* decision, wherein the First Circuit ruled that the scope of the preemption in the *ISP Remand Order* applies only to local ISP traffic. After the case was fully briefed and argued, the First Circuit panel asked the FCC to comment on the scope of the *ISP Remand Order*, which the FCC did in an *Amicus Brief*.[14] The ROO suggests that, because the FCC declined to opine on the ultimate question, the *Amicus Brief* leaves the question of the scope of the order in an "unsettled" state (¶¶ 55, 57). But this position can only be reached by ignoring the very specific comments made by the FCC and by ignoring the clear holding of *Global NAPs I.* While declining to take a position on the ultimate question, the FCC was extremely specific and forthright in stating that the *only issue* before the FCC in the

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[12] The decisions of the federal circuit courts must be followed by the Commission because, by statute, they are given the authority to definitively interpret FCC orders. 2 U.S.C. § 2342(1) (known as the Hobbs Act) states: "The court of appeals (other than the United States Court of Appeals for the federal circuit) has *exclusive jurisdiction* to enjoin, set aside, suspend (in whole or in part), or determine the validity of (a) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47." 2 U.S.C. § 2342(1) (emphasis added). 47 U.S.C. § 402(b) sets forth a few specific exceptions to 47 U.S.C. § 402(a), none of which applies here.

[13] 288 F.3d at 430 (emphasis added).

[14] A copy of the *Amicus Brief* was attached to Qwest's fourth filing of supplemental authority.

ISP Remand Order was intercarrier compensation for local ISP traffic:

> "The administrative history that led up to the *ISP Remand Order* indicates that in addressing compensation, *the Commission was focused on calls between dial-up users and ISPs in a single local calling area.* . . . Thus, when the Commission undertook in the *ISP Declaratory Ruling* to address the question "whether a local exchange carrier is entitled to receive reciprocal compensation for traffic that it delivers to … an Internet service provider," . . . *the proceeding focused on calls that were delivered to ISPs in the same local calling area.'*
>
> ***The administrative history does not indicate that the Commission's focus broadened on remand.*** The *ISP Remand Order* repeats the Commission's understanding that "an ISP's end-user customers typically access the Internet through an ISP service located in the same local calling area." . . . *The Order refers multiple times to the Commission's understanding that it had earlier addressed – and on remand continued to address – the situation where 'more than one LEC may be involved in the delivery of telecommunications within a local service area.'*" (*Id.* at 12-13; citations to *ISP Remand Order* omitted; emphasis added).

The ROO's conclusion that the *ISP Remand Order* applies to all ISP traffic cannot be squared with the FCC's own unequivocal statements that only local ISP traffic was at issue. Unless one were to make the unsupported argument that the FCC rendered a decision on an issue that it acknowledges was not even before it, the only issue FCC could have decided in the order was the compensation regime for local ISP traffic. That is precisely the holding *Global NAPs I*, that the FCC did not preempt the existing access charge rules applicable to interexchange calls placed to ISPs. 444 F.3d at 72. The First Circuit further noted that the *ISP Remand Order* reaffirmed the distinction between reciprocal compensation and access charges:

> The FCC has consistently maintained a distinction between local and "interexchange" calling and the intercarrier compensation regimes that apply to them, and reaffirmed that states have authority over intrastate access charge regimes. Against the FCC's policy of recognizing such a distinction, a clearer showing is required that the FCC preempted state regulation of both access charges and reciprocal compensation for ISP-bound traffic. . . .
>
> Indeed, in the *ISP Remand Order* itself, the FCC reaffirmed the distinction between reciprocal compensation and access charges. It noted that Congress, in passing the TCA, did not intend to disrupt the pre-TCA access charge regime, under which "LECs provided access services ... in order to connect calls that

> travel to points-both *interstate* and intrastate-beyond the local exchange. In turn, both the Commission and the states had in place access regimes applicable to this traffic, which they have continued to modify over time." *ISP Remand Order* ¶ 37. (444 F.3d at 73).

The court also quoted several statements from the *Amicus Brief* that support "the conclusion that the order did not clearly preempt state regulation of intrastate access charges." *Id.* at 74. Thus, since *Global NAPs I* holds unequivocally that the *ISP Remand Order* did not establish a compensation regime applicable to non-local ISP traffic (VNXX), the Arizona Commission retains authority over intrastate access charges, those charges remain fully in effect, and any change to the tariffs that impose the charges may occur only after proper notice and hearing (neither of which has occurred). The fact that, in its *Amicus Brief*, the FCC did not reach a conclusion on the ultimate issue of the scope of the order is irrelevant because the First Circuit was unequivocal on that issue, concluding through the application of its appellate authority to interpret a federal administrative order that the *ISP Remand Order* applies only to local ISP traffic.

In the last three weeks, the D. C. Circuit, in *In re Core Communications*,[15] and the Second Circuit, in *Global NAPs v. Verizon New England*[16] ("*Global NAPs II*"), have weighed in on this issue, and both confirm the conclusions reached in *WorldCom* and *Global NAPs I*.

In *Core Communications*, the D. C. Circuit (the same court that decided *WorldCom*) upheld the FCC's order that removed the new markets rule and growth cap rule that were initially adopted in the *ISP Remand Order*. In the course of describing the history leading up to the order under consideration, the court described the *ISP Remand Order*:

> "[The FCC] *found* that calls made to *ISPs located with the caller's local calling area* fall within those enumerated categories—specifically , that they involve 'information access.' . . . *Those calls*, the FCC concluded, are not subject to § 251(b)(5), but are instead subject to the FCC's regulatory authority under § 201. . . ."[17]

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[15] 2006 WL 1789003 (D. C. Cir. June 30, 2006).

[16] 2006 U. S. App. LEXIS 16906 (2nd Cir., July 5, 2006),

[17] 2006 WL 1789003, at *2 (citations to *ISP Remand Order* and other authorities omitted; emphasis added).

It is impossible to read this language as anything other than a reaffirmation of the *WorldCom* conclusion that the *ISP Remand Order's* holding applies only to local ISP traffic.[18]

Finally, on July 5, 2006, the Second Circuit issued the *Global NAPs II* decision, wherein it affirmed the Vermont Board's decision to ban VNXX in Vermont. The court first concluded that, while the FCC has addressed Internet compensation issues, it "has never directly addressed the issue of ISP-bound calls that cross local-exchange boundaries." 2006 U. S. App. LEXIS 16906, at *11. The implication of that statement is obvious. If the FCC has never addressed the issue of terminating compensation for VNXX ISP traffic, the ROO's conclusion that "the *ISP Remand Order* applies to all ISP-bound traffic" (¶ 59) is a logical impossibility. If the FCC has never addressed any issue other than local ISP traffic, it is impossible to say that the *ISP Remand Order* applies to all traffic—the order, by definition, cannot apply to an issue that it did not address. During the course of its decision, the Second Circuit cited *Global NAPs I* approvingly for the proposition that "[t]he ultimate conclusion of [*ISP Remand Order*] was that ISP-bound traffic *within a single calling area* is not subject to reciprocal compensation." 2006 U. S. App. LEXIS 16906, at *22, citing *Global NAPs I.*[19]

There are only two conclusions that can be reached from these cases. First, the FCC did not even address VNXX ISP traffic in the *ISP Remand Order* and, second, there is no rational way to conclude that the *ISP Remand Order* applies to anything other than what it did address: local ISP traffic.[20] It is therefore also a logical impossibility to conclude that an amendment that

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[18] It is likewise impossible to conclude, given these decisions, that the term "ISP-bound," as used in the *ISP Remand Order*, is anything other than a term of art used by the FCC to refer to local ISP traffic. A broader reading of that term results in an illogical, nonsensical result.

[19] The court also noted that to accept the CLEC's arguments "would allow carriers to operate entirely outside the [access charge] compensation scheme so long as they provide some service to an ISP." 2006 U. S. App. LEXIS 16906, at *27.

[20] *See, e.g., Neshaminy School Dist. v. Karla B.*, 1997 WL 563421, at *7 (E.D. Pa. 1997) (Holding that an administrative agency "overstepped its authority by addressing an issue not before it. . . . [I]n order for the administrative review system to function properly, issues in dispute must be squarely placed before the agency for it consideration. If the issues are not raised and fully argued before the agency, *then the agency cannot properly decide the issue.*" (emphasis added). Under this principle and in light of the FCC's own statements that the only issue before it was local ISP traffic, the *ISP Remand Order* cannot be read, as the ROO does, to

was specifically designed to implement the *ISP Remand Order* could possibly govern traffic (VNXX traffic) that, by definition, is not governed by the *ISP Remand Order*. In light of the consistent and identical conclusions reached by each of these courts, it is hard to conceive of an issue that is more firmly settled than the scope of the *ISP Remand Order* The ROO's findings, in particular paragraphs 55-60, that reach a different conclusion are, as a matter of law, flawed and must be reversed.[21]

C. A Contract to Pay Compensation for Unlawful Traffic is Void as Contrary to Public Policy.

A familiar rule of contract law holds that if the subject of a contract is illegal, then the contract is void or unenforceable as a matter of public policy. In Qwest's legal arguments made previously in this docket that Qwest incorporates here by reference,[22] Qwest made the point that VNXX routing contravenes several Commission rules. The Commission did not rule on those arguments, but did decide to open a generic proceeding, which raises the distinct possibility that the VNXX will be found to violate Commission rules or otherwise be found contrary to public policy. In turn, that raises the distinct possibility that Qwest's obligation to pay compensation for VNXX traffic should be void, or voidable, as a matter of public policy.

Because of the distinct possibility that VNXX is contrary to public policy, at a minimum Qwest's obligation to pay for that traffic, should be suspended until there is a determination of

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apply more broadly.

[21] In addition to the arguments in the prior section, ¶ 59 of the ROO interprets the meaning of the *ISP Remand Order* in a way contrary to this Commission's interpretation from just seven days earlier. The ROO concludes that the *ISP Remand Order* "applies to all ISP-bound traffic." (Emphasis added). However, in Decision No. 68820 entered on June 29, 2006, the Commission concluded that the meaning of the *ISP Remand Order* is unclear and that the law is unsettled. (Decision No. 68820, ¶ 25). As above, the four separate decisions (from three federal circuits) cited by Qwest eliminate the perceived uncertainty–the *ISP Remand Order* is clearly limited to local ISP traffic. At a minimum, however, no developments in the law have occurred to move the Commission's view from June 29 that the law is unsettled, to the view expressed in ¶ 59 of the ROO that the *ISP Remand Order* applies to all ISP traffic. The ROO is in error in that regard, and should not be adopted by the Commission.

[22] *See* Qwest's Opening Brief, filed November 30, 2005, at 19- 26.

that issue.

D. The Commission Should Align Its Decision With Federal Policy Objectives.

In *Global NAPs II,* the Second Circuit issued a strong reminder of the policy purposes of the FCC, one of which it emphasized at length in upholding a total ban on VNXX: to prevent arbitrage schemes that benefit the arbitrageur to the detriment of the company that has made the actual investment in the network. For example, the court noted that the FCC has warned many times of companies who enter the market

> "not so much to expand competition as to take advantage of the relatively rigid regulatory control of the incumbents. In connection with this concern, the FCC has warned time and time again that it will not permit competitors to engage in regulatory arbitrage—that is, build their businesses to benefit almost exclusively from the existing carrier compensation regimes at the expense of both the incumbents and the consumer." 2006 U. S. App. LEXIS 16906, at *8.

Thus, the court noted that it makes good sense for state commissions and not CLECs to define LCAs because "if carriers were free to define [LCAs] for the purposes of intercarrier compensation, the door would be open to *overweening conduct* by the CLECs. . . . Permitting CLECs to define [LCAs] and thereby set the rules for the sharing of infrastructure would eventually require the ILECs to absorb all the costs and allow the CLECs to reap all the profits." *Id.* at *21 (emphasis added). The court's final words in its decision are telling:

> "Global's desired use of virtual NXX simply *disguises traffic* subject to access charges as something else and would force Verizon to subsidize Global's services. This would likely place a burden on Verizon's customers, a result that would violate the FCC's longstanding policy of preventing regulatory arbitrage. Telecommunications regulations are complex and often appear contradictory. But the FCC has been consistent and explicit that it will not permit CLECs to game the system and take advantage of the ILEC's in a purported quest to compete." *Id.* at *33.

These are precisely the policy issues here. Qwest has invested extensively in a state-wide network in Arizona, most specifically in the local distribution plant, loop plant, carrier systems, and local switches without which Level 3 would have no access to Qwest local customers. Yet, Level 3 not only wants to use those facilities free, it wants to profit from

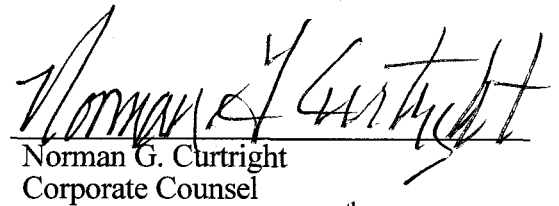
Qwest through the application of terminating compensation charges on all ISP traffic. That position is not consistent with the amendment, or with the *ISP Remand Order*, and results in precisely the regulatory arbitrage so strongly criticized by the Second Circuit.

III. CONCLUSION

For the reasons set forth above, the Commission should not adopt the ROO as written. Qwest respectfully submits to the Commission a proposed form of Amendment, attached as Attachment A. This Amendment addresses the specific matters set forth in these Exceptions consistent with Qwest's positions. With respect to the VNXX controversy between Qwest and Level 3 under the current ICA, for so long as it is in effect and for past periods of its effectiveness, this proposed amendment makes clear that Qwest is not liable to pay ISP termination for VNXX traffic, a position that maintains the status quo.

RESPECTFULLY SUBMITTED this 17th day of July, 2006.

QWEST CORPORATION

By: 

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ATTACHMENT A

Attachment A

THIS AMENDMENT:	
____Passed	_____Passed as amended by _____
____Failed	_____Not Offered _____ Withdrawn

PROPOSED AMENDMENT #___

TIME/DATE PREPARED: July 17, 2006

COMPANY: Qwest Corporation AGENDA ITEM: N/A

DOCKET NO.: T-01051B-05-0415 OPEN MEETING DATE: July __, 2006
T-03654A-05-0415

Page 13, line 2-3 to Page 13, line 22

DELETE: "It does not carve out, or except, VNXX ISP-bound traffic."

INSERT: [None]

Page 13, line 7

DELETE: [None]

INSERT: At end of paragraph 55: "Nevertheless, in its Amicus Brief, the FCC made it clear that in its ISP docket, the FCC 'was focused on calls between dial-up users and ISPs in a single local calling area' and 'the proceeding focused on calls that were delivered to ISPs in the same local calling area.' The FCC also stated that 'The administrative history does not indicate that the Commission's focus broadened on remand.'"

Page 13, lines 12-13

DELETE: "acknowledged the unsettled nature of the law on intercarrier compensation for ISP-bound traffic and ultimately"

INSERT: [None]

Page 13, lines 15-16

DELETE: "We do not find either the *WorldCom* or *Global NAPs* decisions to be determinative in this case."

INSERT: "We find that the *WorldCom* and *Global NAPs* decisions, along with the recent decisions of the D. C. Circuit in *In re Core Communications*, 2006 WL 1789003 (D. C. Cir. June 30, 2006). and the Second Circuit, in *Global NAPs v. Verizon New England* ("*Global NAPs II*"), 2006 U. S. App. LEXIS 16906 (2nd Cir., July 5, 2006), make it clear that the FCC's compensation regime in the *ISP Remand Order* applies only to ISP traffic that originates with a caller and is delivered to an ISP in the same local calling area."

Page 13, lines 17-20

DELETE: "We conclude that the *ISP Remand Order* applies to all ISP-bound traffic and does not distinguish between 'local' and 'non-local' traffic. This finding is consistent with our holding in Decision No. 68820 (June 29, 2006) (a complaint brought by Pac-West against Qwest on the issue of VNXX ISP-bound traffic.)"

INSERT: [None]

Page 13, line 21

DELETE: [None]

INSERT: Insert the word "not" between the words "is" and "subject" so that the phrase reads "is not subject"

Page 14, lines 26-27

DELETE: [None]

INSERT: Insert the word "not" between the words "shall" and "compensate" so that the phrase reads "shall not compensate"